Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

FRANCISCO MAISONET,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

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Francisco Maisonet

26pp

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment's Equal Protection Clause prohibit defense counsel in a State criminal case from exercising peremptory jury challenges on the basis of gender?

2. Given that when petitioner's State criminal case was tried, this Court had not yet decided *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. ____, 128 L.Ed. 2d 89, 114 S.Ct. 1419 [decided April 19, 1994], nor had the New York Court of Appeals held that the gender-based use of a peremptory challenge in a criminal case by a defendant's counsel was proscribed by principles of Equal Protection, did the trial court's disallowance of two such challenges and the Supreme Court, Appellate Division's affirmance of that disallowance, albeit premised upon this Court's holding in *J.E.B. v. Alabama*, 511 U.S. ____, 128 L.Ed. 2d 89, 114 S.Ct. 1419 [1994], constitute a violation of the prohibition against *ex post facto* laws, and the fair warning requirement of *Bouie v. Columbia*, 378 U.S. 347 (1964)?

PARTIES

The names of all parties to the proceeding in the Court whose judgment is sought to be reviewed here, appear in the caption of the case.

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In The

Supreme Court Of The United States

OCTOBER TERM, 1994

FRANCISCO MAISONET,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

OPINIONS BELOW

The certificate denying leave to appeal to the New York Court of Appeals from the Order affirming petitioner's judgment of conviction is officially reported as *People v. Maisonet*, 85 N.Y.2d 864 and appears in Appendix A.

The Decision and Order of the Supreme Court, State of New York, Appellate Division, First Department, which affirmed the petitioner's judgment of conviction is not yet officially reported but it appears in Appendix A.

JURISDICTION

The Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department was dated and entered on November 17, 1994.

The certificate denying leave to appeal to the New York Court of Appeals was dated February 21, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

The prohibition against the passage of *ex post facto* laws as set forth in the United States Constitution; U.S. Const. art. I, section 9, cl. 3 provides:

> No Bill of Attainder or *ex post facto* law shall be passed.

The due process and equal protection clauses as set forth in the United States Constitution; U.S. Const. amend XIV, section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Statutory Provisions

Section 270.25, subd. 1 of the Criminal Procedure Law of the State of New York provides:

> A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.

STATEMENT OF THE CASE

The petitioner was charged via an indictment filed in the County of Bronx, State of New York, with, among other concurrent counts, a count of criminal possession of a weapon in the third degree, for his possession of a handgun on December 12, 1991. Thereafter, and represented by a privately retained counsel, petitioner proceeded to a jury trial in the Supreme Court, State of New York, County of Bronx. Jury selection for petitioner's trial commenced on May 18, 1993.

With some three rounds of voir dire and jury selection completed, the trial court, despite there being no urging from the prosecution, questioned defense counsel's use of certain peremptory challenges. Specifically, after the defense had exhausted all of its peremptory challenges, with eight jurors chosen and six already sworn, the trial court "noticed" that counsel had challenged peremptorily "a number of white jurors;" whereas counsel had not, on the most recent occasion of his exercise of peremptory challenges, exercised such a challenge against a black individual for whom a prior defense challenge for cause had been denied (A6). Further to this, the Court observed that defense counsel had employed three other peremptory challenges to exclude white potential jurors. The Court then advised defense counsel that it had, thus, "noticed something unusual...

[t]hat there's a pattern that *may be* developing" (A6) (emphasis added).

To this, defense counsel responded that all of his peremptory challenges were exhausted; but, he nonetheless provided the Court with an explanation for the use of his final two peremptory challenges. Counsel pointed out that both of the challenges, exercised against a Mr. Pliata and a Mr. Crocchiola, were made because the former had said, in substance, that all of his friends were cops, and the latter had a brother who was a police officer (A6). Thereafter, the trial court countered with the fact that Ms. Usatim, a white female against whom counsel had previously exercised a peremptory challenge, had "no one in law enforcement" (A6). To this observation, defense counsel replied that "there's going to be a female police officer's testimony," whereupon the trial court retorted, in substance, that counsel could not excuse the juror "on the basis of sex" (A7). The Court then recalled that, in addition to Ms. Usatim, counsel had challenged a Ms. Courtney on a previous round of voir dire and challenges, and, therefore, counsel was required "to give [the court] a non-discriminatory basis why... these two women" had been challenged (A7). Counsel assured the Court that his challenges to these two women and the reason why he deemed them not qualified to serve on a jury charged with assessing the guilt or innocence of his client, was premised on a rationale wholly apart from any consideration of gender. The Court then specifically requested that defense counsel "tell" the Court why he felt that "other than the fact that they're female" (A7). Counsel immediately advised the Court that Ms. Usatim "had her home burglarized" and that she was the victim of several car thefts, and as concerns Ms. Courtney, counsel exercised a peremptory challenge against her because her sister was a lawyer who worked in the court system and, as counsel posited, the prospective juror could be unduly influenced by her sister if they should communicate with each other during the case.

Counsel then argued that the prosecutor had used his peremptory challenges to exclude prospective jurors solely on the basis of race, either because they were black or Hispanic. The court then required the prosecutor to provide reasons for certain of his peremptory challenges, after which, it concluded that he had not provided a sufficiently race-neutral reason for the exclusion of a female Hispanic, Ms. Alverado (A8).

The court then issued what can best be described as a global ruling, finding that three jurors, previously excused, two by challenge of the defense (Ms. Usatim and Ms. Courtney) and one by challenge of the prosecutor (Ms. Alvarado), would be recalled and sworn as members of the jury. The prosecutor was accorded one additional peremptory challenge and the defense was accorded two additional such challenges.

The trial court specifically found that defense counsel had exercised peremptory challenges against Ms. Usatim and Ms. Courtney for no other reason but that they were females (A8).

Petitioner's jury trial concluded with a verdict of guilty rendered against him and, thereafter, he was sentenced to an indeterminate period of imprisonment of two and one half (2½) to five (5) years.

Petitioner took an appeal of the judgment of conviction to the intermediate appellate court, the Supreme Court of the State of New York, Appellate Division, First Judicial Department. The judgment of conviction was affirmed by that intermediate appellate tribunal, and discretionary review of the order of affirmance of the Supreme Court, Appellate Division, First Department was denied by the New York State Court of Appeals via Certificate, dated February 21, 1995.

The issues addressed in this petition were specifically raised and argued before both the Supreme Court, State of New York, Appellate Division, First Department and the Associate Judge of

the New York State Court of Appeals to whom petitioner's case had been assigned.

Petitioner, with the consent of the state prosecutor, remains at liberty pending this Court's disposition of the instant Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. This case involves an important question of first impression as to whether the Equal Protection Clause of The United States Constitution prohibits defense counsel in a state criminal case from exercising a gender-based peremptory challenge

The case invites the Court to decide whether the Equal Protection Clause of the Fourteenth Amendment prohibits privately retained defense counsel in a state criminal case from exercising a gender-based peremptory challenge during the jury selection process.[1] The State appellate court which affirmed the judgment of conviction that had been rendered against the petitioner, citing this Court's holding in *J.E.B.. v. Alabama ex rel. T.B.*, 511 U.S. ____, 128 L.Ed.2d 89, 114 S.Ct. 1419 (1994), held, in substance, that the Equal Protection Clause of the Fourteenth Amendment precluded petitioner's counsel from exercising peremptory challenges against two females to the extent that the challenges resulted in, and were based upon "gender discrimination."

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[1] For purposes of this Petition, it will be assumed that defense counsel challenged and dismissed two potential female jurors solely because of the gender of each juror; although throughout all of the State Court proceedings, it was argued that, if he was required to do so, defense counsel provided adequate gender-neutral reasons for exercising the respective peremptory challenges.

Although this Court in *J.E.B.* held that gender, like race, is an unconstitutional proxy for juror competence and impartiality, it did so in the context of lower court proceedings which involved a paternity suit brought in the State of Alabama and filed by the State of Alabama on behalf of the mother of a minor child.

More particularly then, the issue presented for review here is whether or not, as Justice O'Connor has posited in her concurring opinion in *J.E.B.*, this Court's decision in that case should be limited to a prohibition on the government's use of gender-based peremptory challenges. And, beyond that, while conceding that the *J.E.B.* case progressed as the latest progeny of *Batson v. Kentucky*, 476 U.S. 79 (1986), itself a state criminal case where a public prosecutor exercised invidious race-based peremptory challenges, should this Court's holding in *J.E.B.* be deemed limited to non-criminal proceedings and trials where there are no *substantial* countervailing interests such as those which inhere in the rights of the criminal defendant who, more often than not, faces imprisonment or even death as a result of conviction.

The necessity for achieving an appropriate equilibrium between the right of the citizen to sit on a jury and the constitutional rights of the criminal defendant in securing a full and fair determination of his guilt or innocence, then, defines the parameters of the issue raised.

Peremptory challenges have long played an important role in the conduct of criminal trials, and are "one of the most important rights secured to the accused...." *Pointer v. United States,* 151 U.S. 396, 408 (1894). At the same time, it can be said that an abhorrence to racial discrimination finds long standing recognition and support. *Strauder v. West Virginia,* 100 U.S. 303 (1880).

Race and gender discrimination are different, and the respective areas of exclusion have received largely dissimilar treatment

in terms of the rubric of Equal Protection. Classifications based on race are inherently suspect, requiring "strict scrutiny," whereas gender-based classifications are generally examined under a heightened, but less searching standard of review. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

The long-standing abhorrence to racial discrimination in any form has resulted in this Court's curtailing the otherwise historically unfettered ability to employ a peremptory challenge. No longer, as is now quite clear, can the criminal defendant be denied Equal Protection by a public prosecutor's racially discriminatory use of a peremptory challenge, nor can an individual juror suffer the denial of Equal Protection via the racially discriminatory use of a peremptory challenge by any litigant during the course of judicial proceedings. *Georgia v. McCollum*, 505 U.S. _____ (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Batson v. Kentucky, supra*. In achieving this wholly desired set of circumstances, this Court has held that, where raced-based exclusion of a potential juror is accomplished by a defense attorney in a criminal case, criminal defendants are state actors. *Georgia v. McCollum*, *supra*.

An extension of this latter principle into the realm of gender-based discrimination in the context of a criminal case where a defendant clearly requires as much protection as tradition, common law and the Constitution can accord, particularly where the potential juror who is excluded by defense counsel has never explicitly asserted a desire to be seated, or, for that matter, that he or she objects to the "discrimination," is, it is respectfully submitted, unwarranted.

In any event, irrespective of whether or not such a view is ultimately adopted by this Court, the fact remains, that the issue presented in this petition is one of first impression, and the resolution of it, given its importance, is a matter which should be undertaken by this Court.

II. Principles of *ex post facto* and due process should have precluded the trial court from extending the rule of *Batson v. Kentucky* (476 U.S. 79 [1986]) to petitioner's counsel's use of gender-based peremptory challenges, and these same principles should have precluded the state appellate court from applying this court's holding in *J.E.B. v. Alabama ex rel T.B.* (511 U.S. _____, [1994]), when it affirmed his conviction on the basis of that case, despite the fact that the *J.E.B.* case had not yet been decided when petitioner's case was tried.

Insofar as the United States Constitution restricted the use of peremptory challenges in a state criminal trial *at the time this case was tried,* it did so only to the extent that racial discrimination underpinned the challenge, and when that occurred, depending upon who exercised the challenge, the defendant may have been denied equal protection, *Batson v. Kentucky, supra,* or the excluded juror may have been denied equal protection. See *Georgia v. McCollum supra; Edmonson v. Leesville Concrete Co., Inc., supra.* In either case, the constitutional transgression occurred by virtue of the fact that *racial* discrimination had occurred.

Neither this Court nor the New York Court of Appeals had yet held that defense counsel in a criminal case suffered impairment or restriction upon the use of a peremptory challenge on behalf of his client for any reason, save those inhering in the sinister and invidious notion of racial discrimination.

Given the state of the law extant when this case was tried, it was wholly unforeseeable that the trial court would and could impose a restriction upon the petitioner's ability to select a jury in his criminal case which had never before been part of the procedural norms attached to the trial of a criminal case. While it would have been anticipated by defense counsel that potential

use of a peremptory challenge based solely on racial considerations was proscribed, resulting in disallowance of such a challenge, no such anticipation or expectation could have likewise existed with respect to gender-based challenges.

Under the relevant New York statutory provision, "[a] peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service." New York Criminal Procedure Law, Section 270.25[1]. When the trial court in petitioner's case required defense counsel to provide a gender-neutral reason for his peremptory challenges addressed to two potential female jurors, and when it rejected the reasons provided by counsel, thereafter, requiring that the previously excluded females be seated and sworn as jurors, its action constituted an unforeseeable judicial enlargement of the rule of *Batson* which concomitantly resulted in a diminution of the relevant criminal procedure statute, namely, New York Criminal Procedure Law, Section 270.25[1]. See, *Marks v. United States*, 430 U.S. 188, 191-197 (1977); *Rabe v. Washington*, 405 U.S. 313 (1972); *Bouie v. Columbia*, 378 U.S. 347, 353-354 (1964); cf. *Splawn v. California*, 431 U.S. 595, 601 (1977).[2]

Thereafter, moreover, and when the state appellate court affirmed petitioner's judgment of conviction, rejecting his claim to the effect that the rule of *Batson* did not preclude gender-based use of a peremptory challenge, it did so on the basis of this Court's holding in *J.E.B.*, a case which had not been decided at the time of petitioner's trial. This act, itself, constituted a

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[2] Although the appellate court, the Supreme Court, Appellate Division, First Department, found that petitioner's claims of *ex post facto* and due process violations had not been "preserved for review," as they were not specifically argued in the trial court, the appellate court, nonetheless addressed the claims on the merits and rejected them on the authority of *Collins v. Youngblood*, 497 U.S. 37 (1990).

separate and additional violation of petitioner's right to due process of law, and it also ran afoul of principles of *ex post facto*. For, notwithstanding what had occurred in the trial court, the intermediate appellate court was possessed of the unfettered legal power to redress the wrong, but rather than do so, it literally exacerbated the violation of rights, by applying a newly created standard for the jury selection process, where it had not existed at the time petitioner's case was tried. *Thompson v. Utah*, 170 U.S. 343 (1897).

While the *Thompson* case concerned the retroactive application of the Utah State Constitutional provision which decreased the number of jurors previously authorized to pass upon the question of guilt, and not, judicial action *per se*; to the extent that the intermediate appellate court in petitioner's state proceedings possessed the *unfettered legal power* to require that petitioner be accorded a retrial such that his counsel could select a jury under principles of law of which he is aware or can reasonably anticipate, the core rationale of the *Thompson* case should find vitality in this case.[3]

The novelty and importance of the due process and *ex post facto* issues raised by this petition are manifest. In effect, can a state trial court alter the mode of the jury selection process in a criminal case by extending a constitutional rule of law promulgated by this Court, to the clear detriment and prejudice of the criminal defendant, and, can a state appellate court thereafter sanction that extension simply because, after the state criminal trial is completed, this Court decides a case which, at best, impliedly suggests that such a mode of jury selection should occur prospectively? The resolution of these questions should take

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[3] The Supreme Court, Appellate Division, First Department, apart from its ability to review all preserved questions of law, may review and determine any claim in the interests of justice. New York Criminal Procedure Law, Section 470.15[6][a].

place, it is most respectfully urged, in no lesser forum than in this Court, the final arbiter of constitutional issues.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and order of the Supreme Court, State of New York, First Judicial Department.

Respectfully submitted,

ANTHONY J. SERVINO
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(914) 946-8771

Counsel of Record and Attorney for Petitioner Francisco Maisonet

May 8, 1995

State of New York
Court of Appeals

BEFORE: HON. HOWARD A. LEVINE, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

FRANCISCO MAISONET,

Appellant.

CERTIFICATE DENYING LEAVE

I, HOWARD A. LEVINE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Schenectady, New York
February 21, 1995

Associate Judge

*Description of Order:

*Order of the Appellate Division, First Department, entered November 17, 1994, affirming a judgment of the Supreme Court, Bronx County, rendered October 29, 1993.

**Decision and Order of The Supreme Court,
Appellate Division, First Department**

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division : First Department

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent

– against –

FRANCISCO MAISONET,
Defendant-Appellant.

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the attached Order is a true copy of the one filed on November 17, 1994 in the Appellate Division, First Department.

Dated; December 5, 1994
Bronx, New York

Yours, etc.,
ROBERT T. JOHNSON
District Attorney
Bronx County
215 East 161st Street
New York 10451

To. Attorney/Defendant

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Decision and Order of The Supreme Court, Appellate Division, First Department

Asch, J.P., Rubin, Nardelli, Tom, JJ.

53130 The People of the State of New York,

Respondent,

– against –

Francisco Maisonet,

Defendant-Appellant.

Judgment, Supreme Court, Bronx County (Harold Silverman, J.), rendered October 29, 1993, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him as a second felony offender, to a term of 2 1/2 to 5 years, unanimously affirmed. The matter is remitted to Supreme Court, Bronx County for further proceedings pursuant to CPL 460.50(5).

The record supports the trial court's sua sponte determination of the existence of a prima facie showing of gender discrimination after counsel suggested that female jurors were more likely than male jurors to believe a female witness (see, *J. E. B. v. Alabama ex rel. T. B.*, 114 S Ct 1419), and its rejection of counsel's explanation for his peremptory challenges which offered no gender-neutral reasons why he rejected a female juror who was a crime victim and another whose sister was an attorney while accepting similarly situated male jurors (*People v. Allen*, ___ AD2d ___, App. No. 66448 [July 14, 1994], NY App Div Lexis 7394 [3d Dept.]).

Defendant's claim that the court's *Batson* findings violated "*ex post facto* principles" is not preserved for review (see,

People v. Ianelli, 69 NY2d 684, 685, (cert denied 482 US 914), and in any event is without merit (see, *Collins v. Youngblood*, 497 US 37, 41, 52; see also *People v. Irizarry*, 165 AD2d 715).

Any error in the court's preclusion of the cross-examination of a police officer regarding inconsistencies contained in a document prepared by her partner, but reviewed and signed by the witness, was harmless, since the contents of the document were placed before the jury through the testimony of the officer's partner and the evidence of defendant's guilt was overwhelming (*People v. Dackowski*, 50 NY2d 962, 963-964).

It was within the trial court's sound discretion to deny defendant's motion for a mistrial after a police witness inadvertently referred to additional unspecified "contraband" which had been seized from defendant, and the court immediately instructed the jury that the only contraband at issue was the gun which had been recovered at the crime scene (*People v. Tolbert*, 202 AD2d 171, lv denied 84 NY2d 833).

We have considered defendant's remaining contentions and find they do not warrant modification of the judgment.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 17, 1994

A5

Transcript of Jury Selection, May 18, 1993

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM: PART 57

THE PEOPLE OF THE STATE OF NEW YORK

– against –

FRANCISCO MAISONET,

Defendant,

INDICTMENT NO. 9275/91

851 Grand Concourse, Bronx, New York
May 18, 1993

BEFORE: HONORABLE HAROLD SILVERMAN,
Justice.

APPEARANCES:

ROBERT T. JOHNSON, ESQ.,
DISTRICT ATTORNEY, BRONX COUNTY
BY: BRIAN KAPLAN, ESQ.,
Assistant District Attorney

PAT STISO, ESQ.,
Williamsbridge Road
Bronx, New York
Attorney for the Defendant.

Michele Henley
Senior Court Reporter

COURT CLERK: Seven is Vincent Crocchiola and James Pliato.

THE COURT: Mr. Stiso, I noticed that you challenged a number of white jurors, but you have not challenged a juror that you challenged for cause. You have not challenged Mr. Williams, who's not white. You just challenged Mr. Pliota, who's white. The last —

MR. STISO: Judge, I'm through with my challenges.

THE COURT: Miss Usatim is white. Prior challenges, you challenged Mr. Weiner, who's white. Mr. Rowe is white. There were two jurors who were white who were seated, but I noticed something unusual: That there's a pattern that may be developing.

COURT CLERK: The defendant has exhausted all his challenges.

THE COURT: I just wanted you to know, Mr. Stiso, that you attempted to excuse because you felt that the juror was not qualified to serve, but yet you didn't challenge that juror.

MR. STISO: Judge, I disqualified both seven and eight on this particular round because Mr. Pliota has — I believe his quote was, "All my friends are cops," and he was rather hesitant when you asked him if he could be fair given the fact that there would be police testimony here. Number seven, Judge, has a brother who used to be a police officer. Most of my challenges have to do with people's backgrounds.

THE COURT: Usatim has no one in law enforcement. Courtney —

MR. STISO: Judge, there's going to be a female police officer's testimony.

THE COURT: On the basis of sex?

MR. STISO: No.

THE COURT: There's a case before the Supreme Court of the United States where sex is being raised, and New York State I think has indicated that if you try to excuse a juror based on sex that's discriminatory. picking a jury.

THE COURT: But you have to give me a nondiscriminatory basis why you're challenging these two women.

MR. STISO: Judge, I don't. You may believe that they're qualified. I don't believe that they're qualified.

THE COURT: Tell me why you feel that other than the fact that they're female?

MR. STISO: Julia Usatim had her home burglarized. She had a car — she was the victim of car thefts. With respect to Miss Courtney, who has a sister who works in the court system —

THE COURT: She's an attorney.

MR. STISO: As an attorney, despite the fact that jurors have a tendency to tell us that they don't discuss the cases with people that are in law enforcement or in the same type of situation, they do have a tendency to do that, and as a result that's the basis for me knocking her off. It has nothing to do with gender decision. It has nothing to do with being a criminal case.

MR. STISO: Your Honor, I find that reason totally flying in the face of reason. Then there's two other jurors today; Alexander Jackson, who's a male black, and the fifth —

THE COURT: Let me ask you about Mr. Jackson, Mr. Kaplan.

MR. KAPLAN: Mr. Jackson indicated that he had a brother who was arrested and who was in jail, and although he said that his brother does his thing and I do mine, I don't get a true feel that his relationship with his brother — who he indicated he still has close contact with and I believe is now actually, although not incarcerated —

THE COURT: That's race neutral challenge. What about Miss Alverado?

MR. KAPLAN: And Miss Alverado, I felt she was hesitant when I was questioning her and when Mr. Stiso was questioning her was very definitive in her answers, and when I attempted to question her —

MR. STISO: Judge, I never questioned her.

THE COURT: All right. I'm going to have Miss Alverado seated and I'll have Miss Usatim and Miss Courtney seated. I find those three jurors were challenged because of their sex or ethnicity. I'm seating those three jurors because I felt that those were not race neutral or gender neutral peremptory challenges, so those three jurors will be seated.

MR. STISO: Judge, if I may be heard? Miss Usatim has the same exact situation as Mr. Alexander Jackson: She's the victim of a crime. That's a reason —

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No. 94-1877

Supreme Court, U.S.
FILED
JUN 8 1995
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

FRANCISCO MAISONET,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment prohibits defense counsel in a criminal case from utilizing gender as the basis for the peremptory challenge of a prospective juror.

2. Whether this Court's decision in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S.—, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), should be applied retroactively to Petitioner's case, now on direct review, to bar a gender-based peremptory challenge.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

No. 94-1877

FRANCISCO MAISONET,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Supreme Court of the State of New York, Appellate Division, First Judicial Department, citing *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S.—, 114 S.Ct. 1419, 128 L.Ed.2d. 89 (1994), affirmed the trial court's finding of a prima facie showing of gender discrimination and pretext in the reasons proffered by petitioner's trial counsel for the peremptory strike of two female venirepersons. Petitioner's claim that the ruling of the trial court violated the constitutional prohibition against *ex post facto* laws was found to be unpreserved as a matter of law and meritless, in any event. The Order of the Appellate Division, First Judicial Department, entered November 17, 1994, affirming the judgment of the Supreme Court of the State of New York, Bronx County, rendered October 29, 1993, is unofficially reported at

618 N.Y.S.2d 718 (1st Dept. 1994), and is contained in Appendix A of the instant petition.

The certificate denying leave to appeal to the New York Court of Appeals from the Order of the Appellate Division, First Judicial Department, affirming the judgment of the Supreme Court of the State of New York, Bronx County, is officially reported as *People v. Maisonet*, 85 N.Y.2d 864 (1995) and appears in Appendix A of the instant petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the United States Constitution provides, in pertinent part:

No State shall . . . deprive any person of . . . liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, section 9, clause 3 of the United States Constitution provides:

No Bill of Attainder or *ex post facto* law shall be passed.

STATEMENT OF THE CASE

During jury selection at petitioner's trial, the court noted that petitioner had used his peremptory challenges (which had been exhausted at the point of the court's inquiry) to excuse white jurors, and voiced its concern that a racial bias underpinned those strikes (A. 6)[1]. Called upon to provide race-neutral reasons for the challenges of a number of white jurors, counsel proffered the explanation that two of the white jurors he challenged, both male, had friends or relatives who were police officers, and that his challenges related to the jurors' backgrounds. The court then noted that two white female jurors, who had been challenged peremptorily by appellant, were not related to anyone in law enforcement. Counsel replied that "there's going to be a female police officer's testimony [offered at the trial]" (A. 6-7).

Counsel denied that those strikes were based on gender, and submitted reasons for his peremptory challenges[2] (A. 7). The court determined that "three jurors [two by the defense and one by the prosecutor] were challenged because of their sex or [in the case of the prosecutor's questioned challenge] ethnicity", voided the peremptory strikes and placed those individuals on the petit jury (A. 8).

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[1] Numerals preceded by "A" refer to the pagination of Petitioner's Appendix. The Statement of the Case is from the relevant portion of the trial record, which is appended to the petition.

[2] Petitioner asks this Court, for the purposes of this petition, to "assume ... that defense counsel challenged and dismissed two potential female jurors solely because of [their] gender." Petition at p. 6, n. 1.

REASONS FOR DENYING THE WRIT

Point. The constitutional issues have already been determined, adversely to petitioner, in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S.—, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), and *Griffiths v. Kentucky*, 479 U.S. 314 (1987).

Petitioner seeks a writ of certiorari to answer the question whether the Constitutional prohibition against gender-based peremptory challenges should be limited to civil cases and, at the least, to one party to a criminal trial, the government. However, this Court has voided distinctions between the government and private parties invoking state procedural machinery to peremptorily challenge potential jurors in both civil and criminal trials, and does not relegate gender to a position constitutionally inferior to race as an invidious basis for the exercise of peremptory strikes. *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex. rel. T.B.*, *supra*; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S.—, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992)[3]. The decision of the Supreme Court of the State of New York, Appellate Division, First Judicial Department is thus fully supported by existing precedent of this Court, and the writ should not be granted on this ground.

Petitioner also seeks the certiorari review of this Court to hear his claim that the State Courts unconstitutionally applied existing principles prohibiting racial discrimination in the exercise of peremptory challenges to his case. First, this issue was not raised before the trial court and was not preserved for appellate review[4]. There being an adequate state ground for the

[3] But see *Georgia v. McCollum*, 505 U.S. at—, 112 S.Ct. at 2361, 120 L. Ed.2d at 53, conc. op. J. Thomas ("Next will come the question whether defendants may exercise peremptories on the basis of sex.")

[4] New York Criminal Procedure Law § 470.15 provides, in pertinent part, that "(3) A reversal or a modification of a judgment . . . must be based upon a determination made: (a) Upon the law, or (b) Upon the facts, or (c) As a matter of discretion in the interest of justice, or (d) Upon any two or

denial of this prong of the petition, certiorari should not be granted to answer the question raised. 28 U.S.C. § 1257(a); *Henry v. Mississippi*, 379 U.S. 443 (1965); Cf. *Osborne v. Ohio*, 495 U.S. 103, 125 (1990) (timely, ample objection which brings federal error to the attention of the trial judge is sufficient to serve state interests and to preserve claim for the Supreme Court's review). In any event, *Collins v. Youngblood*, 497 U.S. 37 (1990) defeats Petitioner's *ex post facto* claim, and if the issue is viewed as one of the retroactive application of gender-related *Batson* principles, *Griffiths v. Kentucky*, *supra*, renders the holding of *J.E.B. v. Alabama ex. rel. T.B.*, *supra*, applicable to Petitioner's case. A writ of certiorari should not, therefore, issue on this ground.

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all three of the bases specified in paragraphs (a), (b) and (c). . . . (6) The kinds of determinations of reversal or modification deemed to be made as a matter of discretion in the interest of justice include, but are not limited to, the following: (a) That an error or defect occurring at the trial resulting in a judgment . . . not duly protested at trial as prescribed in subdivision two of section 470.05 so as to present a question of law, deprived defendant of a fair trial."

There is no procedural mechanism in New York state practice that describes or permits an affirmance in the interest of justice. Since the judgment was not reversed or modified, Petitioner's *ex post facto* issue was not, as a matter of state procedural law, reached in the interest of justice (A. 3-4). Petitioner thus incorrectly claims a bypass by the state appellate court of its procedural rule (petition, p. 10, n. 2).

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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June 1995